86-242

Supreme Court, U.S.
FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1986

CHARLES W. SMITH,
Petitioner,

v.

DEPARTMENT OF THE AIR FORCE
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Mary E. Printers
5253 North Lovers Lane Rd.
Unit 314
Milwaukee, WI 53225
(414) 463-9977, (414) 264-1900
Pro Se to the Petitioner

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QUESTIONS PRESENTED

1. Did Sgt. Kevin Beck of the Department of the Air Force have the right to enter and search and seize cigarette butts and valium from Charles W. Smith vehicle and wall locker without an affidavit supporting a search warrant.

2. Does the Department of the Air Force have the right to discharge Mr. Smith with out ever producing the officer doing the search (Sgt. Kevin Beck) at any hearing, proceeding without providing Mr. Smith any opportunity to confront said witness.

3. Is the Department of Air Force excused from producing the said witness (Sgt. Beck) and allowing the heresay testimony of Airman Michael Lande as to what Sgt. Beck did.

4. Is the Department of the Air Force excused

or allowed to state that they have no knowledge of Sgt. Beck's whereabouts or no means to produce said witness when the witness is still employed in some branch of the Air Force?

5. Did Department of the Air Force violate due process by not following prescribed rules of the Fourth Amendment to the United States Constitution in obtaining a proper search warrant and proceeding to dismiss the appellant from his employment.

6. Is the Department of Air Force excused from obtaining vital answers to the questions from Sgt. Kevin Beck given under oath to support the Dept. of Air Force's claim that Sgt. Beck was the officer that searched and seized property from Mr. Smith's car and locker.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit was decide on November 18, 1985 and mandate on February 1986 (A). This affirms the court's previous opinion, the Court of Appeal's order denying a petition for rehearing En Banc (A

JURISDICTION

Jurisdiction of this court invoked by U.S.C 1254 (1) Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendering of judgment or decree.

STATUTORY PROVISIONS

The Constitution of the United States

Articles of Amendment

Fourth Amendment states that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Bill of Rights

Unreasonable Searches and Seizures:

"The right of the people to be secure (safe) unreasonable searches or seizures (arrests or taking of belongings) of themselves, their houses, their papers and effects (other personal property) cannot be violated. Warrants (written court orders) for any of these purposes must be issued

with good cause, sworn to by an oath, and must describe, in detail, the place to be searched and the persons or things to be seized. This protects persons from "writs of assistance" (general warrants allowing any search or seizure anytime anyplace) such as were used by the British."

The Constitution of the United States

To the Fourteenth Amendment Section 1 states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdicition the equal protection of the Law.

STATEMENT OF THE CASE

Mr. Charles Smith was discharged from his position as a warehouseman for the U.S. Air Force on Air Force Base Wright-Patterson. He had bee employed there for 17 years. On June 21, 1984, Mr. Smith's unlocked car was searched, because a police dog (Herc) sat between two cars. The search, and contacts to Judge Advocate was made by telephone and all contacts immediate to this search were done by Sgt. Kevin Beck. Sgt. Kevin Beck claims that he found two cigarette butts on the floor of the car. A subsequent search of Mr. Smith's on-base locker found valium prescribed to his mother Ms. Mary Printers. Mr. Smith was discharged from his job and denied all claim to his benefits.

At a hearing in front of the Merit System Protection Board, (November 1, 1984) Sgt. Kevin Beck was not produced. The Air Force claimed they could not find him, and offered

instead the testimony of Airman Michael Lande whose participation in the proceedings were limited by standing behind the car, and being told of Sgt. Kevin Beck findings, by Sgt. Kevin Beck at no time was Charles Smith ever able to confront, or question Sgt. Kevin Beck or to defend himself against these allegations.

REASONS FOR ALLOWING THE WRIT

1. This is a case of Constitutionality, if this court does not prevail and this decision of the United States court of appeals for the Federal Circuit is allowed to stand its conflicts with the very privileges of the United States Constitution under the Fourth and Fourteenth Amendment.

2. If the Court allow the decision of the Merit System Protection Board to stand when the petitioner has neither had opportunity to confront his accuser and questions handed down by the Merit System Protection Board have

never been answered.

U.S.C. 4th A. Specifically, agents of the Department of the Air Force testified that they entered and searched the defendant's automobile without consent or warrant, apparently in belief that undefined conduct of a dog constituted probably cause. There was, however, no suspect in sight on which to fasten the concept of a crime in progress and the search violated the Fourth Amendment rights of petitioner in that there was insufficient evidence to constitute probable cause of a felony in progress or a felony by the petitioner at any time. The initial search being illegal it could not serve as the basis for a legal warrant. No where in the testimony is there a list of factors which would cause the dog to sit in between cars as he did. Therefore, one must know a signgularity of dog's sitting could not even stand up to the question of a fact which would support probably cause. Assumptions, obviously, are

not facts.

4. Further, testimony reveals that the Air Force Base Commander gave oral approval for the search without taking any testimony except an erroneous legal conclusion of a captain, thus, violating defendant's constitutional right to due process supported particularly by the Fourth Amendment's guaranteed oath or affirmation without which a warrant cannot issue.

5. The form 1176 obviously was not obtained at 9:03 on June 21, 1984, but sometime later, it appeared from the record that "search approval prior to search was verbal. It is not contested that the auto was open not locked.

Further, to convict someone of possession of a controlled substance, it must be proved that the defendant was in possession of the drug and that he knew or believed he was in possession.

Awareness of the defendant of the presence of the cigarette butts is the ultimate test of

possession.

Even if the government had introduced evidence that the defendant knew the butts were on the floor of his car, they would still have to show that the cigarette butts was in such form, bulk, quality and quantity that knowledge could be imputed to him. Here, there is no evidence of his knowledge or that if he did see the butts, he should have known what they were, the sample being as small as it was.

6. This point also is critical. The record is void of evidence that the defendant knew the butts were present in his car. The burden of proof is on the government. It is a not a question of the quality of defendant's answer. Further, there is no testimony in the record to demonstrate that an ordinary person would have known the materials, from their form, were drugs. Restated, there is not in this record any evidence by which anyone could

reasonably impute knowledge to the defendant. People vs Azuilar, 223 C.A. 2d 119, 35 Cal. RPtr. 516 (1963).

7. "This Court in Mapp v. Ohio, 367 U.S. 643, 646, recognized as the Court had in Boyd that "the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630. At the very outset of its opinion in Mapp this Court relied on and quoted at length from the opinion in the Boyd case, which had relied on the Fourth and Fifth Amendments together to forbid the use in court of evidence obtained through an unreasonable search or seizure. 367 U.S., at 646-647. Use of such evidence, the Court said in Mapp, would be "tantamount to coerced testimony." 367 U.S., at 656. And we said last Term in Malloy v. Hogan, 378 U.S. 1,8:

> "Mapp held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and

> that the two guarantees of personal security conjoined in the Fourteeth Amendment to make the exclusionary rule obligatory on the States. We relied upon the great case of Boyd v. United States, 116 U.S. 616 . . . ."

It was because of the Court's reliance on the Boyd doctrine--which held that the Fourth and Fifth Amendments together barred use of unreasonably seized evidence--that I joined the Court's opinion in Mapp. See 367 U.S. 643, 661 (concurring opinion). And for that same reason I agree with the Court Today that the Fourth Amendment's protection against unlawful search and seizure and the Fifth Amendment's protection against compelled testimony apply in forfeiture proceedings like the one here. This was the holding in Boyd, which itself involved a forfeiture proceeding, and I would follow it in forfeiture proceedings as well as in criminal cases. In doing so, I recognize that this interpretation

was reached in Boyd on the principle that "constitutional provisions for the security of person and property should be liberally construed." 116 U.S., at 635. But that interpretive principle, I think, is desirable on if our Constitution is to be given its proper place in our Government.

I also agree with the Court that our remand expresses no view as to whether the trial court was correct in its ruling on the issue of probable cause, and that the Supreme Court of Pennsylvania is free on remand to review the trial court's finding, and that of course, as declared in Mapp, the standard of probable cause is the same in the state courts as in the federal courts."

The petitioner was not arrested or charged by Sgt. Kevin Beck and was told to return back to work, so the petitioner worked from June 21, 1984 until his dismissal.

This above statement verifies that Sgt.

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Kevin Beck found no drug problem with Charles W. Smith, also it establish that Sgt. Beck found no wrong doing of Charles W. Smith.

Since the petitioner was not arrested or charged by policeman Sgt. Kevin Beck, Mr. Robert Scott the proposing official and Major Joseph L. Reuwer deciding official had no right to discharge Charles W. Smith without being charged for a crime.

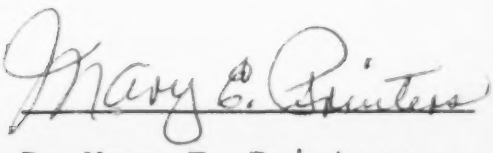
Under Section 1983 the respondants made and enforce a law that deprived the petitioner his privileges of working for a living, due process of law and the equal protection of the law. All of which is in violation of the laws of the United States and the State of Ohio.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted

MARY E. PRINTERS



By Mary E. Printers
Pro St to the Petitioner

UNITED STATES COURT OF APPEALS
for the FEDERAL CIRCUIT

CHARLES W. SMITH, Petitioner,	)	
V.	)	No. 85-2499
DEPT. OF THE AIR FORCE, Respondent,	)	

O R D E R

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

_____

Francis X. Gindhart,
Clerk

February 18, 1986

UNITED STATES COURT OF APPEALS
for the FEDERAL CIRCUIT

CHARLES W. SMITH, Petitioner,	)	
v.	)	No. 85-2499
DEPT. OF THE AIR FORCE, Respondent,	)	

O R D E R

Decided November 18, 1985 the entered judgment issued as a mandate February 27, 1986. We affirm on the basis of the Board's opinion because we do not find that the Board's decision was arbitrary capricious and abuse discretion or otherwise not in accordance with law or that it was obtained without procedures required by law rule or regulation having been followed or that it was unsupported by substantial evidence 5 U.S.C Sec. 7703 (c) (1982) see Hayes U.S. Department of the Navy 727 F. 2d 1535, 1537 (fed.) cir. (1984).

FOR THE COURT

Francis X. Gindhart,
Clerk

CHARLES W. SMITH, Petitioner,	)	
v.	)	Proposal to Remove
DEPT. OF THE AIR FORCE, Respondent,	)	

The proposing official, Mr. Robert Scott stated in his letter dated July 19, 1984 that, 1) It is proposed to remove you from your position with the Air Force not earlier than 30 calendar days from the date of receipt of this letter for possession of marijuana an schedule IV substances (Valium) on Wright-Patterson Air Force Base on 21 of June, 1984; and to promote the efficiency of the service. 2) At approximately 0850 on 21 June 1984, Sgt. Kevin Beck while on routine patrol, in the parking lot adjacent to Building 257, Area C, Military Working Dog Herc responded to the drivers side door searm of a 1977 white over blue Chysler, Ohio License MKL 273. A leads check of the license number identified

you as the registered owner. AIC Michael Lande stood by your vehicle while Sgt. Beck made contact with the Staff Judge Advocate, Capt. Woodard, at approximately 0900 and advised her of the MWD's response. She stated probable cause did exist. At approximately 0903, Sgt, Beck contacted Col. Jay Strayer, Acting Base Commander and advised him of the MWD's reponse and advised him that Capt. Woodard stated probable cause did exist. Col. Strayer granted Sgt. Beck the authority to search your car. Sgt. Beck made contact with you and advised your of the MWD's response. A search of your vehicle revealed two handrolled cigarette butts (roaches) on the floor board in front of the drivers seat. Sgt. Beck then advised you of your rights under the Fifth Amendment of the U.S. Constitution, the nature of the offense being investigated and your right to counsel. You acknowledged that you understood your

rights and waived same. Sgt. Beck the asked you for consent to search your wall locker in Building 257, Area C, and you gave Sgt. Beck permission to search your locker. A search of your locker revealed an amber colored container with the name of Mary Printers on the label. It contained seven each yellow tablets scored on one side and marked "Roche 5 Valium" and 5 broken pieces of this type tablet, and one blue tablet scored on one side and marked "Roche 10 Valium." All items confiscated as evidence via AF form 52. The two handrolled cigarette butts were analyzed microscopically and chemically and found to contain Cannabis, commonly known as marijuana. The tablets marked "Roche 5 Valium and "Roche 10 Valium" were identified as valium which is a schedule IV controlled sbstance. Possession of Marijuana and schedule IV controlled substance (Valium) is prohibited on Wright-Patterson Air Force Base.

3) You are reminded that you received a ten calendar day suspension effective on 23 April 1984 for possession of marijuana and valium an Wright-Patterson Air Force Base on 8 February 1984. This previous offense was also considered in arriving at the decision to propose your removal.

4) You may reply to this letter personally in writing, or both to me (Area C, Building 257, Post 825, extension 74848), to Mr. Andrew P. Robbins (Area C, Building 257, Post 825, extension 74848), To Mr. Richard C. Chavers (Area C, Building 257, Post 825, extension 3919), to Mr. E. Aldon Woolley (Area C, Building 1, Room 4, extension 76158), or to Major Joseph Reuwer (Area C, Building 1, Room 4, extension 76158). You may also submit affidavits or other documentary evidence in support of your reply. In addition, you may be accompanied by an attorney, a union representative, or other representative of your choosing in accordance with the criteria out-

lined in AFR 40-750 when making your reply. it is necessary that a memorandum be made of the principal points of any oral reply that you make. Therefore, you must inform any of the above named supervisors to whom you are replying at the beginning of your conversation that you intend your conversation to be an oral reply to this proposed action.

5. You will be allowed 10 calendar days from the date of your receipt of this notice to reply. Consideration will be given to extending this time limit if you submit a written request stating your reasons for desiring more time. This right to reply is a significant right granted you. If you believe this proposed action is unwarranted, it is important that you reply stating completely all the reasons supporting your belief.

6. If you wish to review the regulations pertinent to this action or review the material being relied upon to support this action,

or obtain advice and assistance in preparing your reply, you may contact your Employee Relations Specialist, Mr. Warren D. Clark, Building 274, extension 72481. An appointment will be arranged by your supervisor upon your request.

7. If you are otherwise in an active duty status, you will be allowed 8 hours of official time off from your job without charge to leave for reviewing all the material being used to support the reasons in this notice, for securing affidavits and other documentary evidence in support of your reply. Your request for official time off from your job must be requested by you from the undersigned.

8. No decision to remove you has been made or will be made until you reply, or until the time limit for your reply has expired if you do not elect to reply. Any reply you make will be given careful consideration before a final decision is made. Whether or

not you reply, a written notice of final decision will be given you.

9. If you do not understand the above reasons for this proposed action, contact me for further explanation.

10. No action based on the reasons set forth herein, will be taken to remove you from duty status in your present position during this 30 calendar day advance notice period.

ROBERT B. SCOTT
Warehouse Foreman

DATE OF DELIVERY: July 19, 1984
TIME OF DELIVERY: 1530

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)	
	)	
Charles W. Smith	)	Case Number:
	)	CH07528410667
v.	)	
	)	Date:
Dept. of the Air Force	)	January 2, 1985
	)	
	)	
	)	

INTRODUCTION

By petition filed on August 30, 1984, Charles W. Smith appealed an action wherby the Department of theAir Force, Wright-Patterson Air Force Base, Ohio removed him from his position as a Warehouse Worker, WG-06. His removal, effective August 24, 1984, was based on charges of illegally possessing marijuana and valium on the agency's premises. A hearing was held on this matter on November 1, 1984.

JURISDICTION

A Federal employee may appeal to the Merit

Systems Protection Board from any action which is appealable by law, rule, or regulation. 5 U.S.C.A. 7701(a) (West 1980). The appellant has an appeal right to the Board under the provisions of 5 U.S.C.A. 7511-7513 (West 1980) and 5 C.F.R. 752.401 and .405 (1984).

ANALYSIS AND FINDINGS

The agency proposed the appellant's removal because he allegedly illegally possessed marijuana and a schedule IV substance (valium) on the premises of Wright-Patterson Air Force Base on June 21, 1984. To support its charge the agency produced an Incident/Complaint Report dated June 22, 1984 (Agency File at tab 8g), wherein it states that at approximately 8:50 a.m. on June 21, 1984, while on routine patrol in Area C, a military working dog named Herc, responded to the driver's side of a 1977 white over blue Chrysler, License #MLK-273, in the parking lot adjacent

to building 257. Sgt. Kevin Beck, Herc's handler, contacted Base Security Police Headquarters via radio and learned that the vehicle to the appellant. AIC Michael D. Lande, who accompanied Sgt. Beck on the patrol, stood by the appellant's vehicle while Sgt. Beck contacted Captain Woodard of the Staff Judge Advocates Office. Captain Woodard expressed her opinion that probable cause existed to search the vehicle. Sgt. Beck then contacted Colonel Strayer who grated him authority to search the appellant's vehicle. Sgt. Beck also contacted the appellant who was present when the vehicle was searched. A search of the vehicle revealed two handrolled cigarette butts on the floor in front of the driver's seat. The appellant was read his fifth ammendment constitutional rights and the appellant acknowledged he understood his rights and waived them. Sgt. Beck then requested and received permission from the appellant

to search the appellant's wall locker in building 257. A search of the locker revealed an amber colored container which contained various colored pills. The cigarette butts and amber container containing pills were confiscated, tagged, and taken as evidence. The cigarette butts, Exhibit 1, were analyzed microscopically and chemically and found to contain Cannabis, commonly known as marijuana. Exhibits 2B and 2C, pills found in the amber container, were presumptively identified as valium, which is a scheduled IV controlled substance.

AIC Lande testified that he prepared the written report found at tab 8g of the agency's file. He also testified to the incidents that occurred on June 21, 1984. His testimony paralleled the information contained in his written report. The agency also produced a report from the Miami Valley Regional Crime Laboratory, Dayton, Ohio, indicating the yellow and blue tablets marked as valium

were analyzed and found to contain diazaeplam, a schedule IV substance (Agency File at tab 8h). The Chief of Criminal Investigations testified that he performed the microscopic and chemical analysis of the cigarette butts in question and found that they contained cannabis, commonly known as marijuana.

The appellant alleges that he was not in "possession" of the cigarette butts and pills in question because they were not found on his person. He further alleges that his girl friend planted the two "roaches" (referring to the cigarette butts) in his car on June 21, 1984, without his knowledge. He further alleges that the valium tablets found in his locker belonged to his mother, were from a prescription filled back in 1977 or 1978, and that he had just forgotten them in his locker. He also alleges that he had been prescribed valium in the past and therefore was in legal possession of the valium.

To support his allegation that the marijuana was planted, the appellant produced a sworn affidavit signed by a Gloria Turman, dated August 8, 1984, wherein she states that in the early morning of June 21, 1984, she placed two roaches in the appellant's car because she was angry with him after a domestic argument. She then stated that she called the Base and notified Base officials that the appellant had a gun in his car. She knew there was no gun in the car, she stated, but wanted Base officials to find the two roaches she had planted. See Agency File at tab 3. The appellant also produced a letter signed by Mory Summer, M.D., indicating that valium had been prescribed to the appellant in August of 1983 (Appellant's Hearing Exhibit 1).

My review of the record finds that a preponderance of the evidence supports the agency's charge that the appellant illegally possessed marijuana and valium on the agency's

premises on June 21, 1984. As the agency correctly pointed out in its closing argument, possession does not mean an illegal substance is found on the person of the individual who is so accused. The agency correctly cites United States v. Staten, 581 F.2d 878, 879 (D.C. Cir. 1978), for the legal principle that it is unnecessary to show that the accused had the drug on his person or within his immediate reach; it is enough that he was knowingly in a position or had the right to exercise dominion and control over it, either directly or through others. The court also stated that possession can be established by circumstantial evidence.

In this case I do not find it credible that the marijuana was planted in the appellant's vehicle without his knowledge. AIC Lande testified that the military working dog, Herc, responded to the marijuana during a routine patrol. AIC Lande denied that any call was received that singled out the appel-

lant's vehicle to be searched. The agency also produced its Security Police Desk Blotter for June 21, 1984, and no call concerning the appellant's vehicle is recorded (Agency Hearing Exhibit 8). With respect to the valium found in the appellant's wall locker, I find that the appellant's possession constitutes an illegal possession of a controlled substance. I do not find that a prescription to take valium in August of 1983 constitutes a legal basis for being in possession of valium on the agency's premises on June 21, 1984. Therefore, I find that the agency's charge of illegal possession of marijuana and valium on the agency's premises is sustained.

In addition to contesting the charge, the appellant also alleges that the agency's action is invalid due to harmful procedural error 1) Specifically, he claims that the documents used by the agency to support and or take this action contain errors of omission and/or

differed from the original documents. With respect to the Incident/Complaint Report Dated June 22, 1984 (Agency File at tab 8g), the appellant cites the lack of signatures, missing information, and misplaced information as examples of harmful error. My review of the document finds that even if the examples cited by the appellant constitute error, the errors are not harmful. That is, the errors cited do not materially affect the completeness or reliability of the information stated on the form. Moreover, AIC Lande independently testified to the events that support the charge and are reported on the Incident/ Complaint Report. The appellant also claims that the agency committed harmful error by inserting in the record copies of the proposed removal notice and the decision notice that are not identical to the originals. Even assuming, arguendo, the agency committed error in this regard, the appellant has failed to show that any differences in the docu-

ments are material. My review of the documents in question find no change in the bodies of the documents. The only differences are immaterial matters such as a coordination stamp placed on the bottom of the of the copy of agency's July 19, 1984, proposed removal notice (Agency file at tab 2). Therefore, I find that the agency had committed no harmful procedural errors.

In light of my finding that the agency supported its charge by a preponderance of the evidence, I will consider whether taking adverse action based on the sustained charge promotes the efficiency of the service. The Board has upheld adverse action based on the same type of charge proven in this case. See Swann v. Tennessee Valley Authority, MSPB Docket No. AT075209257 (November 15, 1983), (adverse action found appropriate in case where employee possessed a controlled substance on the agency's premises); Rice v. Department of the Air Force, 9 MSPB 833

(1982), (upheld removal after second incident of finding marijuana in employee's vehicle on the agency's premises). Accordingly, I find that the agency has shown a nexus between the appellant's proven misconduct and the efficiency of the service.

I have also considered whether removal is an appropriate penalty in light of the Board's holding in Douglas v. Veterans Administration, 5 MSPB 313 (1981). Therein the Board stated that in selecting a penalty an agency must strike a responsible balance within the tolerable limits of reasonablesness. The Board further identified the type of factors an agency should consider in determining the appropriateness of its penalty. In this case the record discloses that the deciding official, Major Reuwer, gave detailed consideration to the pertinent Douglas factors prior to making his decision (Agency File at tab 2). Major Reuwer also testified that the fact that the appellant had been recently suspend-

ed (on April 20, 1984, Agency File at tab 8e) for the identical misconduct was an important factor in deciding to remove the appellant this time. He found the appellant's fully satisfactory performance and length of service insufficient to mitigate the serious, repeated misconduct at issue. The agency also submitted its table of peanalties indicating that the removal action was in accordance with published agency guidelines (Agency Hearing Exhibit 7). In light of the deciding official's review of the penalty and the Board's holding in the similar case of Rice (cited above), I find that the removal action is within the tolerable limits of reasonableness.

DECISION

The removal action is affirmed.

The decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 6, 1985 unless a petition for review is filed with the Board

reopens the case on its own motion.

ADMINISTRATIVE AND JUDICIAL REVIEW

Any party to this appeal, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. An original and two copies of any petition for review must be filed with the Clerk of the Board for the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than the date cited above.

The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations. The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(1) New and material evidence is available that, despite due

diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b) (1), the appellant has the right to seek judicial review of the Board's final decision on this appeal. (The foregoing statement is not to be interpreted as a basis for establishing court jurisdiction where such jurisdiction does not otherwise exist.) A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed whil the case is pending before the Board. To be timely, the petition for judicial review must be received by the court with 30 days of the final Board decision.

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For the Board:

Victor W. Russell
Presiding Official

Mr. Victor W. Russell
U.S. Merit Systems Protection Board
Chicago Regional Office
John C. Kluczynski Bldg.
230 S. Dearborn St. - 31st floor
Chicago, Illinois 60604-1669

Pursuant to your order in the case of Charles W. Smith v. Department of the Air Force, counsel for the agency submits a list of anticipated witnesses, requesting that they be approved to testify at the hearing scheduled for 1 November 1984.

1. Rober D. Scott - proposing official.

2. Major Joseph L. Feuwer - deciding official.

3. Sgt. Kevin Beck - involved in search which resulted in the discovery of materials leading to the disciplinary action in issue.

4. AIC Michael Lande - present during the search of appellant's automobile.

5. William F. Lyon - evidence custodian; re chain of custody.

Respectfully submitted,

Charles A. Buenning, Jr.
Attorney-Advisor
Agency Representative

Hereby certify that I have served copies of the foregoing to the following parties this date by regular mail.

Charles W. Smith
2626 Germantown, Apt. 7
Dayton, Ohio 45408

Mary Printers
5253 Morth Lovers lane
Milwaukee, Wisconsin 53225

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)	
	)	
Charles W. Smith	)	Case No.
	)	CH07528410667
v.	)	
	)	Date: November 1, 1984
Dept. of the Air Force	)	
	)	Opening Statment in
	)	Parts

Then we discussed the witness that was to be called, and I had ordered that the agency produce the same witnesses that the appellant requested that agency was going to call, and we discovered this morning that Sgt. Beck wasn't here. The agency indicated Sgt. Beck has completed his tour of duty with the Air Force Base, and that he subsequently joined the Marines Corp. He is no longer engaged Air Force Employee. "I indicated that I was concerned about that", because I anticipated as the appellant, that Sgt. Beck would be here and the agency did not make him available

and I explained that the board expects when the employee is still an employee of the government, even though he is not an employee of the agency involved, that efforts still be made available so long as he is a government employee. I indicated that I would ask Ms. Printers if she would give me the questions that she has to ask of Sgt. Beck. I would indicate which I thought was most pertinent that the agency also would have an opportunity to ask questions in writing to Sgt. Beck, and that the agency would serve those questions that they plan to ask on Ms. Printers and of myself, and then I would put the responsibility on the agency to produce a written response from Sgt. Beck to the questions on the appellant, and the agency and I have not set a time frame for that. I want to think about it a little further and discuss it a little bit further. Please remind me before we end this hearing to try to establish

a time frame for accomplishment of that. This would be the chain of command that the proposal went through.

For the Board:

Victor W. Russell
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)
	)
Charles W. Smith	)
	)
v.	)
	)
Department of the Air Force	)
	)

AGENCY ORDERED TO OBTAIN
KEVIN BECK'S RESPONSES TO
QUESTIONS

Pursuant to my ruling at the hearing on the above-captioned matter, the agency is hereby ordered to obtain Mr. Kevin Beck's responses to the following questions. Mr. Beck's responses must be sworn and in writting. The agency shall return his responses to me no later than November 23, 1984. The responses shall be served on the appellant by the same date.

AGENCY'S QUESTIONS:

1. Do you recall any contact between yourself and appellant, Mr. Charles W. Smith on 21 June 1984?
2. Assuming that the answer to 1 above is "yes," were you assigned as handler of a military work dog named Herc on that date?
3. How long had you worked with Herc, if you were in fact his handler?
4. Did AIC Lande accompany you during duty hours on 21 June 1984?
5. If you encountered Mr. Smith on 21 June 1984, what were the causes and circumstances?
6. How did you come to be in the parking lot adjacent to Bldg. 257 on 21 June 1984?
7. To your knowledge, were you directed to search Mr. Smith's car on 21 June 1984 because of reports that he had a gun therein, or were you on regular patrol ?
8. Did Herc alert on Mr. Smith's, car?

If so, how did he do that?

9. Who secured permission to search Mr. Smith's car, and how was that done?

10. Who search the car? Where was the non-searching officer during the search?

11. What was found during the auto search? Where? Was the material in plain view?

12. What, if anything, did you tell Mr. Smith regarding his rights after the auto search?

13. If material was taken from the auto, what was done with it?

14. What was taken from appellant Smith's locker in building 257, if anything?

15. If items were taken from the locker, what was done with them?

16. What was base policy regarding obtaining written confirmation of verbal search authorizations given by the Base Commander as of 21 June 1984?

17. Block 9 of the incident report states that

the report was received by AIC Somora. Which officer reported the incident and how?

APPELLANT'S QUESTIONS:

1. Will you please explain whether and, if so, how you filled out an incident report on this matter?
2. Were you conducting an investigation or were you on a routine check on June 21, 1984?
3. Did the drug dog respond to Mr. Smith's person? If not, why not?
4. The incident report was made out June 22, 1984 but the incident occurred on June 21, 1984, in the early working hours. Will you explain why it took so long?
5. Was a complaint concerning Mr. Smith received by AIC Somora/Dispatcher via radio on June 21, 1984?
6. Were you looking for a gun in Mr. Smith's car?

7. The incident report states that the complaint time was 0820 hours ad the dogs responded at 0850 hours. Mow can it be both?
8. Is there any police report to back up Mr. Scott's charges that Mr. Smith was in possession of marijuana and valium?
9. Is there any regulation forbidding the use of and the bringing of valium on the Air Force Base?
10. Was there any crime lab report on the so-called "butts" to verify the contents?
11. Isn't true that the incident report does not reveal that butts were found on the floor of Mr. Smith's car?
12. Isn't it true that the incident report does not reveal that valium was found in Mr. Smith's locker?

For the Board:

Date: November 6, 1984

Victor W. Russell
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)	
	)	
CHARLES W. SMITH	)	
	)	MOTION TO RESCIND
V.	)	ORDER OF
	)	NOVEMBER 6, 1984
DEPT. OF THE AIR FORCE	)	
	)	
	)	

Now comes the Department of the Air Force and moves that the "Order to Obtain Kevin Beck's Responses to Questions," dated 6 November 1984, be rescinded. The Agency has been unable, after extensive efforts stated in the attached affidavit of Mr. Warren D. Clark, to locate this witness. Given that AIC Lande, Kevin Beck's partner, testified at hearing as to the circumstances of the searches and seizures in issue, there exists sufficient evidence to make a determination as to the sufficiency and propriety of the action.

Respectfully submitted

CHARLES A. BUENNING, JR.
Agency Representative

AFFIDAVIT

STATE OF OHIO)
) SS
COUNTY OF GREENE)

Being first duly cautioned and sworn, now comes Warren D. Clark and states the following: I, Warren D. Clark an Employee Relations Specialist assigned to the 2750 Air Base Wing Civilian Personnel Office at Wright-Patterson Air Force Base, Ohio, do hereby certify that on 7, 8 and 9 November 1984 the following efforts were made by me to contact former Sergeant Kevin P. Beck, SSN; 275-58-8285 who after his enlistment joined the United States Marine Corps and was to be in basic training at Parris Island, South Carolina. On 7 November 1984, the World Wide Locator was called (1-202-694-1624) and I was informed that Kevin Beck was assigned to the Receiving Administration Center at Parris Island, South Carolina. The operator at

there. On 8 November 1984, I called the Base Commander's Office at Parris Island (832-2535) and I was informed that Kevin P. Beck was not stationed at Parris Island. I then called the Marine Corps Base at Camp Lejeune, North Carolina on AUTOVON 484-1110. The operator transferred my call to the Administration Center and they informed me that Kevin Beck was not stationed there. I then called the operator at Portsmouth Naval Ship Yard on AUTOVON 684-0111 and she transferred my call to the Marine Barracks and was informed that Kevin Beck was not stationed there. I called Norfolk Naval Ship Yard on AUTOVON 961-0111 and the operator transferred my call to the Marine Barracks. They also informed me that Kevin Beck was not stationed there. On 9 November 1984, I called Marine Corps Headquarters (227-0101) Washington, D.C. The operator transferred me to the Marine Barracks and they also imformed me that Kevin Beck was not stationed there. I again called the

World Wide Locator (1-202-694-1624) and I was informed that Kevin P. Beck, SSN: 275-58-8285 was shown as being assigned to the Receiving Administration Center at Parris Island, South Carolina. I again called the Receiving Administration Center at Parris Island (832-2946) and they again informed me that Kevin Beck was not stationed there. On 15 November 1984, I called the World Wide Locator again and Kevin P. Beck, SSN: 275-58-8285 was still shown as being assigned to the Receiving Administration Center at Parris Island, South Carolina. I have been unable to locate Kevin P. Beck as directed by Mr. Victor Russell, Hearing Examiner for the Merit Systems Board, Chicago, Illinois.

Sworn to and subscribed in my presence, this 16th day of November 1984.

WARREN D. CLARK
Employee Relations Specialist
Labor and Employee-Management
Relations Section
Civilian Personnel Branch

STATE OF OHIO
COUNTY OF GREENE

Subscribed, sworn to and acknowledged before me by WARREN D. CLARK this 16th day of November 1984.

(SEAL)

_____
Notary Public
Vicki L. Burns
In and for the State
of Ohio

My Commission Expires
April 30, 1986

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)	
	)	November 1, 1984
Charles W. Smith	)	
	)	Hearing: Pertinent
v.	)	Parts of
	)	AIC MICHAL LANDE'S
Dept. of the Air Force	)	Testimony
	)	
	)	

BY MR. BUENNING :

Q How do you get authoriztion?

A What we do is to call over the phone and we swear to everything, and they give us the authorization. Then we have . . . we type this out and in 24 hours to swear and get in writing.

Q You are saying you get a verbal authorization, yes or no, followed by a written authorization?

A We get a verbal yes or no, and in this case we got a verbal yes, and have it up there in 24 hours.

Q Airman Lande, after you got the

approval from Colonel Strayer, what happened next?

A Okay, we went back out to the car and contact was made with Mr. Smith. Sergeant Beck advised him of the dog's response and told him that we had authority to search the vehicle and I don't remember if the car was locked or not, but we went ahead and opened the car and we started to search the car -- well, I'm sorry, Sergeant Beck searched the car and --

Q Where were you during that time?

A Okay, Sergeant Beck was searching the car and Mr. Smith was standing behind Sergeant Beck and because I was Sergeant Beck's backup, I was standing behind Mr. Smith with my dog.

Q Okay. And, did you observe the search?

A Yes.

Q Okay. And, what happened then?

A All right. So, Sergeant Beck was searching and I guess he was searching the

front seat and the back seat. And when he got up to the front seat, and underneath, driver's side-front seat, just on the floor board of front seat, found 2 cigarette butts.

Q Okay. Now, after you and Sergeant Beck and the dog came to Mr. Smith's car and the dog alerted, what happened next?

A All right. Sergeant Beck went into building 257 and called captain Woodword, who is the Staff Judge Advocate. I think that was at 9:00. And, what he does is -- well, what we have to do is we have, she has to state probably cause existed. So, once we explained the events that had happened, we'll say the dog we walking through the parking lot 257, Herc responded on a car, license plate MKL 273, he responded by sitting and she'll ususally yes, probably cause existed, go on and call the Base Commander and see if you can get a search warrant.

Q Okay. Is this the customary operating procedure?

A Yes, when we get a search warrant.

Q You had done that before?

A Yes.

Q Okay.

A Okay. And then we called the Base Commander and I guess the Acting Base Commander at that time was Colonel Strayer and we'll explain the events again to him and we'll explain that Captain Woodword or the Staff Judge Advocate said probably cause existed and he'll either give us authority to search or not.

Q Okay. I'll show you a document now which we'll label proposed Agency Exhibit 5 and ask you if you can identify what that document is.

(WHEREUPON, Agency's Exhibit 5 was marked for identification.)

A All right. This is our authority to search and seize and Air Force Form 1176 and we fill this out, we type it up and we just give it -- send it up to the Base Com-

mander for his signature.

Q And that was the one prepared pertinent to this case?

A Yes.

Q Okay.

Q Okay, now also explain what Building 168 is for the record.

A Our Building 168 is headquarters for Law Enforcement, It's our security headquarters.

Q That's at Wright-Patterson Air Force Base?

A Yes, that's Wright-Patterson Air Force Base.

Q Okay, and when did you turn those items over to custom?

A Well, we turned them over to the Desk Sgt., I am not sure of the hour, but it was on the same day. It was immediately following the search, we went to Building 168 to write the report.

Q 21st of June?

A Yes, 21st of June.

Q One moment please. Okay, did you create a report of the incident?

A Yes.

Q Okay, now to show you what has already been accepted into evidence in the file tab 8, and ask if you can identify that.

A Alright, this is a DD. 1569, the incident/complaint report. What this is we write this out on cases, it is a detailed report of what happened. Its like a story, and what we do, write a third person so, it states everybody's name in it and not written from my point of view, but I myself wrote this, and my hand written copy is not in here, someone else typed it.

Q Okay, do you customarily prepare those reports in cases like this?

A Yes, we always do.

Q Okay, anything at all about the search, or the procedure involved was out of the ordinary in your experience?

A No.

Q Pass the witness sir.

Victor Russell

Ms. Printers, do you have any questions for this witness? You may question.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:)
)
Charles W. Smith)
)
v.)
)
Dept. of the Air Force)
)
)

Mr. Robert Scott is the Proposal Removal Official.

Ms. Printer asked Mr. Robert Scott a question about the Incident/Complaint Report and it went like this:

Q Will you look at that? What would the full report be on?

A Second and third page.

Q Sir, would you like at the second page, will you tell me what form this is?

A LD1569.

Q Say that again.

A DD1569.

Q Where do you see that at Sir?

A Bottom of first page.

Q I ask you again. Will you take a look at the top of this report and tell me or will you read the whole thing please.

Mr. Buenning:

Sir, I'm going to object. It says what it says, and you can read for yourself as to what it says. I can't see the purpose of reading what it says.

Mr. Russell:

I can't see the purpose of reading what it says.

Ms. Printers:

It's important to my case; they are saying that Charles was in possession and I am saying that these two forms are different, and I am saying that the Government ah . . .clearly spelled out how these forms suppose to be filled out, to whom they are suppose to be filled out by and I am saying that this is not a part of the Incident/Complaint Report.

Mr.Buenning:

Sir, we have already had the testimony

on that form, the person whom created the report. I don't see how he could testify on that.

Mr. Russell:

Now this witness has testified that he relied on the police report of the incident report. In order to ah. . . develop his charge he brought, and ah. . .what element here again, there is an inconsistency in those two. I think that's a matter for argument or you may ask him where he got from the police report information about possession that he have. I will permit that kind of questioning, but I can't see any reason to read the record of the entire report.

Ms. Printers:

OK....OK

Mr. Russell:

I will permit you to ask where on that police report he see something that tell him that the appellant was in possession of marijuana and control substance.

Q Ok, Mr. Scott, where do you see in the Incident/Complaint Report that tells you that Charles was in possession of marijuana and valium?

A . . . .(pause) Ah, "where it says" ah. . .Sgt. Beck ask to search his wall locker, Sgt. Beck searched his wall-locker, searched the locker, and got ample color bottle that contain with the name of Mary Printers. "I am nct an authority on assessment" (of a police report), therefore, I have to rely on the police report.

Mr. Russell:

But you inferred, that then, it was your imprint that he was in possession of drugs in both substance - is that your interpretation of what that says.

A No, the full report, it showed what he had in the locker.

Mr. Russell:

So you believe that shows, you refer from that, shows that he was in possesion of it ....

A No answer.

Mr. Russell:

You didn't particular pick out any specific language in that report, you relied on the entire report to formulate your opinion that it showed possession .... is that what you are saying?

A Yes.

Q You didn't take the sentence, or the two sentences and put in the proposal?

A No.

Q Is that what you was trying to get at?

Ms. Printers:

A Yes.

Mr. Russell:

Ok.

Ms. Printers:

I just like to ah. . . just establish this for a point down the road that this is the report that Mr. Scott relied on.

Mr. Russell:

Yes, he already testify that he relied on the police report incident report shown as DD1569.

Ms. Printers:

Ok, In ah. . .view of your testimony of the police report, Mr. Scott, will you tell everyone if the charge for ah...possession of marijuana and valium was a correct charge, and was the removal in order based on the report from the police Incident/Complaint Report.

Mr. Scott:

A I believe it was correct.

Q Charge and removal, and that was done for the efficiency promote the efficiency of service ah...can you tell me ah..in what way will this promote the efficiency of service, Sir?

A Well, ah...his performance, ah... for one thing, too, there are penalty for and....,we are in business of defense supply

ing for defense, and if something is not done, our services is not sufficient, and I'm not going to let that happen...that's why I made the proposal so this would not affect ..... if I didn't propose anything in this, it would happen, it may happen.

Q Mr. Scott, the ah...to improve the efficiency of service you testified a short while back that Charles was not under influence to your knowledge, and he did work that day.

A That day, but he's not being charged with under influence, as far as I'm concern.

Q But the efficiency of service, to promote the efficiency of service you are saying that he wasn't doing his job.

A I'm saying that this type of action such as....., having something illegal, on the having drugs inside the building making it possible, other times being under influence, and making it possible being under influence and because of the past, then it was

sort for the efficiency of service.

Mr. Russell:

May I ask a question, follow up from that, I think what Ms. Printers is really getting at, if the appellant could still do his job, how was the efficiency of service promoted removal for this kind of offense.

Ms. Printers:

Yes Sir.

Mr. Scott:

I believe of the, tab 971 would give credits to facts that doing something here would give would promote the efficiency of service which I provide.

Mr. Russell:

But you are looking for reasons why you think that, not just conclusion, to promote the efficiency of service. He could still do his job, and you not going to ask him for his job, being under influence, at least believe he was, where he was charged here with possession, and he was still able to work that

day. The question is, how is service more efficient, if he was able to work and the charges was concerning possession, and not anything directly that interfered with his work on his job.

Mr. Scott:

Well, you are, what I get from the questions you referring to efficiency of the service for one day, and the proposal of this action refer to the services from now on or from that day on.

Ms Printers:

How could you draw a conclusion from now on, if he was able to stay in his capacity and ....produce, and have tha ability, to produce the amount of work that was assigned to him.

Mr. Scott:

You are...have come to the conclusion that he was able to perform his duties that was assigned to him.

Mr. Russell:

But I think, she entitled to make that conclusion because he hasn't been charged with efficiency, so there's no charge, so the appellant is entitle to presumption that he performs his duties, there is no charges he didn't perform.

DISCREPANCY IN TESTIMONIES
BETWEEN MR. ROBERT SCOTT
AND MR. JOSEPH REUWER

Mr. Russell: The presiding official stated I don't understand what you mean when you say performed his duties. What is the purpose in the testimony what are you seeking?

Mr. Buenning: I am looking to talk about efficiency of service.

Mr. Russell: The charges here don't readily pertain to work performance matteres, it is really outside the actual work performance.

Mr. Buenning: The only reason I bought it up is due to D. V. work history.

Mr. Russell: I will permit you to ask a work history question; whether or not this employee performs satisfactorily, but I won't permit that kind of questioning.

Mrs. Printers: Mr. Scott, what was Mr. Smith's rating when he left one or two weeks before he left?

Mr. Scott: Fully successful.

Mrs. Printers: Major Reuwer, are you aware of the rating Mr. Smith had one or two weeks before his departure?

Major Reuwer: Yes, I asked to see it.

Mrs. Printers: And what was that rating, Sir?

Major Reuwer: It was slightly below the grading scale . . . as I recall.

Mrs. Printers: What kind of category would that fall into?

Major Reuwer: It would fall into the category of acceptable.

Mrs. Printers: Acceptable?

Major Reuwer: Acceptable.

Mr. Russell: You will be surprised to learn that Mr. Scott testified that the appellant was rated as being fully successful.

Major Reuwer: We changed the rating form lately to successful. I'm not sure which

one would be appropriate, and the phase (Major Reuwer asked to see the rating form).

Mr. Russell: Are you stating that the keeping good order and discipline in both the efficiency of the service independently of whether or not the individual has performance?

Major Reuwer: The individual has performance. There is no question in my mind, like one individual was permitted to go unpunished with possession and others begin to question whether or not management is about enforcing the law. I frequently get questions from young Airmen about that. Approximately half of my work force is military and half civilian. The rules are approximately the same on both sides. I find myself unable to make very much exceptions.

Mr. Buenning: Ask Mr. Scott now did you ever have the occasion to discuss this particular incident with Major Reuwer?

Mr. Scott: No

Mr. Buenning: Asked the same question to Major Reuwer. Okay, did you have the occasion to discuss the case with Mr. Scott?

Major Reuwer: Yes, on several occasions (one said no, and the other said yes).

Mr. Buenning: Okay, and what was the substance of the discussion?

Major Reuwer: Well, I certainly wouldn't make a decision without the consultant of first of all the supervisor required about Mr. Smith.

Mrs. Printers: Mr. Scott were you aware that the security police sent him back to work?

Mr. Scott: Yes . . .sent him back to work on which day?

Mrs. Printers: On June 21, 1984.

Mr. Scott: Yes, I was.

Mrs. Printers: Okay, then if he was sent back to work, what kind of condition would he have been in if he was in such bad condition would they have referred him back to

work?

Mr. Buenning: I'm going to bject Sir; again he is not charged with being under the influence, its possession, not under influence.

Mrs. Printers: Mr. Russell, would it be okay to ask him was he under the influence of any drugs on June 21, 1984.

Mr. Scott: I didn't charge him with any, not to my knowledge.